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DECISION



20589
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-203818

DATE: January 21, 1982

MATTER OF: MAC Services, Ltd.

DIGEST:

1. Protester may protest directly to GAO without first exhausting administrative appeals process under OMB Circular A-76 in cases where question does not concern determination between contract and in-house performance.
2. A specific basis of protest raised after the filing of a timely initial general protest is timely if it merely provides additional details of the earlier-raised allegation.
3. Determination of low bidder based on cost adjustment process which was not disclosed to bidders is defective. Nevertheless, since protester was not prejudiced by evaluation, protest is denied.

MAC Services, Ltd. (MAC), has protested the proposed award of a contract to Inland Service Corporation (Inland) under invitation for bids No. DABT10-81-B-0007 issued by the Department of the Army (Army) for refuse collection and disposal services at Fort Benning, Georgia.

The IFB was issued on March 2, 1981. Bids were solicited on the four schedules set forth below:

- "Schedule 1 - Government-furnished equipment and landfill.
- "Schedule 2 - Government-furnished equipment, Contractor-furnished landfill.
- "Schedule 3 - Contractor-furnished equipment, Government-furnished landfill.

"Schedule 4 - Contractor-furnished equipment
and landfill."

Each schedule required contractors to submit bids covering a 1-year contract period with two 1-year option periods. The IFB further provided that option prices would be evaluated for purposes of award and that a "single contract will be awarded to the responsible bidder submitting the lowest responsive bid for either Schedule 1, 2, 3, or 4."

The IFB also contained a "Notice of Cost Comparison" clause which provided:

"Bidders are notified that this solicitation is a part of a cost comparison to determine whether accomplishing the specified work in-house or by contract is more economical.

"The Government's in-house cost estimate shall be based on the statement of work set forth in this solicitation and shall be submitted to the Contracting Officer in a sealed envelope not later than the time set for bid opening. At the time of the bid opening, the bids and the sealed Government in-house estimate will be opened and the results announced. This announcement is based upon an initial comparison of the cost of in-house performance with the cost of contracting out as indicated on the cost comparison form. The abstract of bids, the completed cost comparison form and detailed supporting data relative to the in-house cost estimate shall be made available to interested parties for review.

"A period of fifteen (15) working days will be provided for public review by interested parties of the cost comparison data. No final determination regarding the question of in-house or Contractor performance will be made during this review period. Interested parties may file written requests,

based on specific objections, for review of the cost comparison results with the Contracting Officer during this period. This review shall only be used to resolve questions concerning the calculation of the cost comparison, and shall not apply to decisions regarding selection of one bidder in preference to another. Decisions with regard to such requests are final."

This clause, on its face, advised bidders that the Government's "in-house cost estimate" would be used only to determine whether "contracting out" would be more economical. However, the Army also intended to use the cost estimate for another purpose which was not evident elsewhere in the IFB. As discussed below, elements of the undisclosed cost estimate--especially relating to Government-furnished equipment--were added to the actual bids submitted in order to determine which bid "would result in the greatest cost savings to the Government."

Bids were opened on June 23, 1981. The bids, including option prices, of Inland and MAC were:

	Schedule (Sch.) 1	Sch. 2	Sch. 3	Sch. 4
Inland	\$1,874,959	--	--	--
MAC	3,669,215	\$3,446,209	\$3,802,185	\$3,201,838

The Army reports that the "adjusted cost of in-house performance" was \$3,348,128 under each schedule. Thus, the acceptance of either of the low bids under schedules 1 or 4 would have been more economical than performing the service in-house.

The IFB contained no indication as to how the Army would determine the low bidder entitled to award under the disparate schedules involved--assuming, as was the case here, that bids on more than one schedule were found to be below the Government's in-house cost estimate.

To determine which of the low bids contained greater value, the Army employed an adjustment process so as to eliminate, for purposes of bid evaluation, the differing requirements involved in schedules 1 and 4.

For example, to Inland's bid a dollar adjustment of \$193,515 was added representing the "depreciation and opportunity cost" associated with the "Government-furnished equipment" to be provided the contractor if award were to be made under schedule 1. The end result of this adjustment process was to raise Inland's schedule 1 bid to \$3,021,326.95 and MAC's schedule 4 bid to \$4,108,016.35. Because of this evaluation, Inland's schedule 1 bid was selected for award.

By letter dated June 29, 1981, and received by us on June 30, 1981, MAC filed a protest with our Office alleging that the only appropriate award should be based on schedule 4 to MAC. By letter dated July 1, 1981, the contracting officer requested additional information from MAC concerning its protest. On July 9, the two parties held a meeting and by letter dated July 14, 1981, MAC provided additional information. In its July 14 correspondence, MAC primarily challenged the correctness of the various adjustments the Army made to each bid in order to determine the bid having the "greatest cost savings."

Based on our review, we deny the protest.

In an administrative report, the Army argued that the protest be dismissed for failure by MAC to first exhaust the administrative appeals process provided under the above cost-comparison clause before filing a protest with our Office. The clause's appeal procedure is intended, however, to resolve questions concerning the determination between contract and in-house performance rather than questions concerning award to one bidder in preference to another bidder. Since MAC is questioning the award to Inland, it was proper for MAC to directly file its protest with us without first seeking administrative redress through the Army.

The Army has also questioned the timeliness of MAC's letter of July 14, arguing that it was filed more than 10 days after MAC was aware of the basis for its protest and that it raised additional allegations which were new and independent of the allegation raised in the timely June 30 letter. Generally, whether a specific basis of protest raised after the filing of a timely initial general protest is timely is determined by the

relationship between the later-raised base to the initial protest. See Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412. If the later-raised base is characterized as a new and independent ground for protest, then it must independently meet the timeliness requirement. However, where the letter merely provides additional details for an earlier-raised timely allegation, we will consider the additional argument.

We consider the July 14 letter to be additional details supporting the initial general allegation. The contracting officer had requested additional information and MAC in its July 14 letter merely provided further details.

We conclude that the cost-adjustment process used by the Army here for the additional purpose of determining the successful bidder must be considered to be deficient since bidders were not informed of this process in the IFB. As stated in General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376:

"* * * GTC objects to any consideration of residual value simply because that factor was not specifically included as an evaluation factor. We agree with GTC in this regard; however, present value calculations, as well as the 'other cost factors,' were also not included in the solicitation as evaluation factors and, for the same reasons, should not be considered in bid evaluation. To permit bidders to compete on equal terms, the invitation must be sufficiently definite to permit the preparation and evaluation of bids on a common basis. Bidders cannot compete on an equal basis as required by law unless they know in advance the basis upon which their bids will be evaluated. 36 Comp. Gen. 380 (1956). We have consistently held that if any factors other than bid price are to be considered in determining the low bidder, the IFB must advise bidders of such factors. * * *" (Emphasis in original.)

As also stated in Defense Acquisition Regulation § 2-201(a)(M)(i) (Defense Acquisition Circular No. 76-26, December 15, 1980):

"* * * invitations for bids shall contain
* * * a statement of the exact basis upon
which bids will be evaluated and award
made, to include any Government costs or
expenditures (other than bid prices) to
be added or deducted, or any provisions
for economic price adjustment as factors
for evaluation."

Generally, a mere defect in an IFB does not require resolicitation if award under the defective IFB would serve the Government's needs and where bidders would not be prejudiced by the award. See, for example, Seaward International, Inc., B-199040, January 16, 1981, 81-1 CPD 23.

MAC does not contend that an award to Inland would fail to meet the Army's needs; however, MAC does insist that it was prejudiced by the cost evaluation. Specifically, MAC has alleged the following grounds of prejudicial cost evaluation:

1. The evaluation of Government-furnished equipment and landfill for comparison purposes was artificially low and, thus, Inland's price should have been evaluated at a higher figure.

2. Fort Benning had not obtained a necessary State permit to operate a sanitary landfill--thereby precluding any award under schedule 1.

3. If Fort Benning were to comply with the State permit requirement, the Army would incur \$50,000 or more in costs in order to obtain the permit. These costs should have been added to Inland's bid for comparison purposes.

4. MAC's schedule 4 bid, as evaluated, should have been reduced by the cost of Government landfill equipment which would not have to be used under a schedule 4 contract and could be used elsewhere by the Army.

5. The costs added to its schedule 4 bid for contract administration and general and administrative expenses were excessive since the costs were the same

costs added to Inland's schedule 1 bid. This was improper since, allegedly, a schedule 1 contract involves more Government administrative effort.

The Army's replies to these specific objections and our analysis of these objections follow.

Evaluation of Government-furnished
Equipment and Landfill

The Army's reply to this ground of protest is as follows:

" * * * Government Furnished Equipment
* * * [was] costed as prescribed by DA
Circular 235-1 * * *. In accordance with
above regulations, equipment costs consist
of depreciation and opportunity cost and
do not represent acquisition/replacement
or current market value costs. No cost
for the sanitation landfill is shown * * *
since land does not depreciate. * * * There
are no provisions within the regulatory
guidelines that permit current fair market
value of land to be used as a base for cost
procedures. * * *

* * * * *

"For cost comparison purposes, the
dollar values of government equipment
were properly applied in accordance with
OMB Circular A-76 and the cost comparison
handbook. Landfill value was properly
considered in the cost of capital for
both the in-house performance and for
contractor performance where the con-
tractor elected to use the government
owned landfill."

MAC has not taken specific objection to the Army's reply. Consequently, and since we otherwise find no objection to the cost analysis, we cannot question this evaluation.

State Permit

The Army's position on this issue is as follows:

"* * * [Fort Benning] has authority from the State of Georgia to operate the on-post landfill until 28 February 1982. The installation intends to bring its landfill into compliance with the state requirements and obtain the necessary permit. We recognized that failure to obtain a permit from the State would cause termination at some future date of either in-house operation or any contract awarded under schedule I * * *. However, speculation over the probability of this event is no basis to change the government's decision to award a contract."

Since Fort Benning has current operating authority and intends to obtain any necessary permit, we cannot conclude that award under schedule 1 is improper merely because of the possibility that at some later date the contract may have to be terminated because of the lack of a permit.

Cost of Obtaining State Permit
Should be Added to Inland's Bid

The Army is "unable to substantiate the * * * claim that \$50,000 had already been expended in an effort to bring Fort Benning into compliance with state requirements." Moreover, the Army notes that the State of Georgia does not charge a fee for a permit.

Even if \$50,000 is added to Inland's evaluated bid, as urged by MAC, it is clear that Inland's bid would still remain low by a wide margin.

Credit for Value of Landfill Equipment

As noted above, we cannot question the monetary value which was added to Inland's bid for comparison purposes with MAC's schedule 4 bid. Since this consideration was properly added to Inland's bid, it would be improper to deduct a similar value from MAC's

schedule 4 bid. If this were done, the net effect would be to consider this factor twice to Inland's detriment.

Contract Administration and Overhead Expenses

The Army's position on this issue is as follows:

"* * * The [contract administrative expense] factor [4%] allowed for the Government's cost of administering contracts * * * [is] in accordance with OMB Circular A-76 * * *. The Government's Surveillance Plan is applicable to all schedules, and inspection efforts are equitably applied under all schedules to insure that required services as stated in the solicitation are performed to the acceptable standards * * *. In Schedule IV * * * the contractor must meet collection point and equipment safe and serviceable standards, whereas in Schedule I * * * the contractor must meet landfill and equipment safe and serviceable standards. The Cost Comparison Handbook * * * states that the general and administrative (G&A) rate (16.02%) * * * is applicable to * * * all schedules. In Schedule IV * * * the G&A rate was applied against contract administration cost only, whereas in Schedule I * * * the G&A rate was applied against contract administration and government furnished property. * * * It is the * * * [Army's] position that the contract administration * * * and General and Administrative " * * rates were equitably applied under Schedule IV * * *."

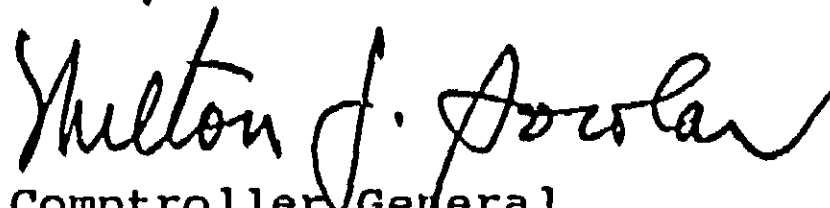
We cannot question the Army's position on the evaluation of these expenses.

Conclusion

Based on our review of these cost objections, we find no basis to conclude that MAC is prejudiced by the proposed award to Inland given the wide difference in the evaluated bid prices. Nevertheless, we are recommending to the Secretary of the Army that future

solicitations expressly inform bidders of the costs that will be added to bids in order to determine the successful bidder.

We deny the protest.

for 
Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-203818

January 21, 1982

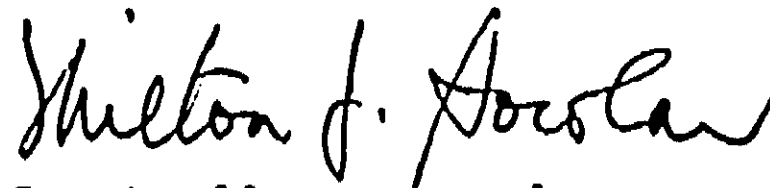
The Honorable John O. Marsh
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision of today denying the protest of MAC Services, Ltd., under invitation for bids No. DABT10-81-B-0007 for refuse collection and disposal services at Fort Benning, Georgia.

Notwithstanding our denial of the protest, we recommend that you take corrective action as noted in the decision. Please inform us of the action taken.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure